No. 44561-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Mattila,

Appellant.

Clark County Superior Court Cause No. 12-1-01888-0

The Honorable Judge Scott Collier

Appellant's Reply Brief

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I. MR. MATTILA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO SEEK SUPPRESSION OF STATEMENTS AND EVIDENCE THAT WERE OBTAINED PURSUANT TO HIS UNLAWUL ARREST.

The burden is on the state to prove that an exception to the warrant requirement justifies a warrantless arrest. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Mr. Mattila's defense attorney provided ineffective assistance by failing to move for suppression of statements and evidence seized pursuant to his client's unlawful arrest. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

The arresting officer testified that he handcuffed Mr. Mattila and locked him in the back of a police car after their initial interaction at the bottom of the driveway. RP 59, 61, 245. The officer stated that Mr. Mattila was "in custody" at that point. RP 59. Nonetheless, Respondent argues that the record is unclear as to when Mr. Mattila was arrested. Brief of Respondent, pp. 5-13.

As the state points out, the test for whether someone is under arrest is an objective one. Brief of Respondent, p. 11. Nonetheless, Respondent notes that the officer said that Mr. Mattila was "detained" and "in custody" but never that he was "under arrest." Brief of Respondent, pp. 9-

10. But the term the officer used is irrelevant to the objective inquiry into whether Mr. Mattila was under arrest. A reasonable person in Mr. Matilla's position would have believed that s/he was "in police custody with the loss of freedom associated with a formal arrest" when s/he was handcuffed and locked in the police car. *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004).

Whether a person's private affairs have been disturbed under article I, section 7 does not turn on the reasonableness of police conduct. *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Still, the state argues that the officer's handcuffing and locking Mr. Mattila in the squad car was not an arrest because it was justified by the fact that the officer was alone and needed to investigate further. Brief of Respondent, pp. 8-13. The officer's subjective justification for arresting Mr. Mattila without probable cause – no matter how reasonable -- does not affect the inquiry into whether he was, in fact, arrested. *Snapp*, 174 Wn.2d at 194.

A *Terry* stop converts into an arrest when the officer manifests intent to take a person into custody and actually seizes or detains him/her. *State v. Salinas*, 169 Wn. App. 210, 218, 279 P.3d 917 (2012) *review denied,* 176 Wn.2d 1002, 297 P.3d 67 (2013). A manifestation of intent typically includes "handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport." *Id.* The officer

arrested Mr. Mattila when he manifested his intent to take him into custody by handcuffing him and placing him in the patrol car. *Salinas*, 169 Wn. App. at 218. Despite this, the state argues that the officer was merely conducting a *Terry* stop when he handcuffed Mr. Mattila and locked him in the police cruiser. Brief of Respondent, p. 12. Respondent's argument is unsupported by the evidence.

Probable cause must be based on reasonable trustworthy information within the officer's knowledge at the time of arrest. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996). The officer testified that he did not yet believe that a burglary had taken place when he arrested Mr. Mattila. RP 50, 53, 59. Even so, Respondent argues that, if Mr. Mattila was arrested, it was based on probable cause. Brief of Respondent, pp. 13-17.[1] The state claims that the officer knew that a burglary was in progress and that Mr. Mattila's car had been at the Mock

[1] The officer testified that he ran the plates on the car Mr. Mattila was driving and discovered that it was stolen. RP 249. It is clear from the context that the officer ran the plates around the same time that he was searching the car, well after Mr. Mattila was arrested. RP 249. The officer did not say anything indicating that he arrested Mr. Mattila for possession of a stolen vehicle. RP 48-71, 232-65 The state also appears to argue, however, that the officer could have known that the car Mr. Mattila was driving was stolen before he arrested him. Brief of Respondent, p. 15. Respondent points out that the record contains "only one statement" by the officer regarding when he ran the car's plates. Brief of Respondent, p. 15. The state does not offer any explanation as to why the officer's "one" statement that he ran the plates long after Mr. Mattila had been arrested is insufficient to prove that fact. Brief of Respondent, p. 15.

house. Brief of Respondent, pp. 14.[2] The state's argument is directly contradicted by the officer's testimony. RP 50, 53, 59. Additionally, even if the officer did believe that Mr. Mattila's car had briefly been in the Mock driveway, that fact does not provide probable cause to believe that he had committed a crime.[3]

The "inevitable discovery doctrine" cannot justify the admission of evidence seized in violation of art. I, § 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Even so, Respondent argues that Mr. Mattila cannot show that he was prejudiced by his attorney's failure to move to suppress because, ostensibly, he would have been lawfully arrested later anyway. Brief of Respondent, pp. 16-17. But Mr. Mattila was not lawfully arrested later. He was unlawfully arrested without probable cause when he was at the bottom of the Mock driveway. His statements and the evidence found in the car are the direct result of that

[2] The state also argues that it is unclear whether Mock told the officer that her home had been burglarized before or after the officer drove Mr. Mattila up the driveway to the house. Brief of Respondent, p. 9. But the officer testified at the suppression hearing and at trial that Mock told him the burglary had taken place after Mr. Mattila was in custody. RP 52, 245.

[3] The state also argues that Mr. Mattila's claim that he was looking for his girlfriend's house was "facially absurd" given the location of the car. Brief of Respondent, p. 15. But Mr. Mattila's car was in a residential area. RP 242. The officer did not testify that he disbelieved Mr. Mattila's claim about his girlfriend's house. RP 244. In any case, reason to believe that Mr. Mattila was lying about his reason for being in the area is insufficient to provide probable cause to believe that he had committed a crime.

unlawful arrest. The state's inevitable discovery argument is misplaced. *Winterstein*, 167 Wn.2d at 636.

Mr. Mattila's defense counsel provided ineffective assistance by failing to move for suppression of his statements and evidence seized from the vehicle pursuant to his illegal arrest. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Mr. Mattila's convictions must be reversed. *Id.*

A. Defense counsel provided ineffective assistance by failing to object to the misleading redaction of Mr. Mattila's statement.

Mr. Mattila relies on the argument in his Opening Brief.

Additionally, the state concedes that there was insufficient evidence to convict Mr. Mattila of unlawful possession of a firearm. Brief of Respondent, p. 21. If accepted by the court, the state's concession renders this claim unnecessary.

II. PROSECUTORIAL MISCONDUCT, WHICH ENCOURAGED THE JURY TO CONVICTED BASED ON PASSION AND PREJUDICE, DENIED MR. MATTILA A FAIR TRIAL.

A prosecutor commits misconduct by making arguments designed to inflame the passions or prejudices of the jury and by "testifying" to "facts" not in evidence. *In re Glasmann*, 175 Wn.2d 696, 704-705, 286 P.3d 673 (2012). It is also misconduct for a prosecutor to argue that the jury should convict based on the accused person's "bad character,"

selfishness, or lack of caring for other people. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000).

The prosecutor argued at length that Mr. Mattila didn't care about the occupants of the homes – including "terrified" ten-year-old Paityn – or their property. RP 658-60. There was no evidence, however, that Mr. Mattila knew Paityn was in the house.

The prosecutor's argument encouraged the jury to convict based on passion, prejudice, the prosecutor's assessment of Mr. Mattila's character, and "facts" not in evidence, rather than the evidence in the case. *Glasmann*, 175 Wn.2d at 704-05; *Hofbauer*, 228 F.3d at 699.

Notably, Respondent does not argue that the prosecutor's comments were proper. Brief of Respondent, pp. 17-20. Instead, the state argues that Mr. Mattila was not prejudiced because the prosecutor was "merely ask[ing] the jury to care" about the property crimes. Brief of Respondent, pp. 19-20. But due process prohibits a prosecutor from "ask[ing] the jury to care" about a case based on impermissible factors. *Glasmann*, 175 Wn.2d at 704-05; *Hofbauer*, 228 F.3d at 699. Mr. Mattila's case was no more or less exciting than a typical burglary case. The constitution does not permit a prosecutor to inflame the jury's passion and prejudice in a property crime case any more than in a murder case. This circumstance, in which the facts of the case were not particularly

emotional, only exacerbates the prejudice caused by the prosecutor's injection of un-admitted "facts" – including those intended to make Mr. Mattila look like a bad person – into closing argument.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making arguments designed to inflame the passion and prejudice of the jury and "testifying" to "facts" not in evidence. *Glasmann*, 175 Wn.2d at 704-05. Mr. Mattila's convictions must be reversed. *Id.*

III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MATTILA OF UNLAWFUL POSSESSION OF A FIREARM.

Respondent concedes that the state presented insufficient evidence to convict Mr. Mattila of unlawful possession of a firearm. Brief of Respondent, p. 21. The court should accept the state's concession.

IV. THE COURT VIOLATED MR. MATTILA'S RIGHT TO COUNSEL BY ORDERING HIM TO PAY $1,500 IN ATTORNEY'S FEES WITHOUT CONDUCTING INQUIRY INTO WHETHER HE HAD THE ABILITY TO PAY.

A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); U.S. Const. Amends. VI, XIV.

Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.* Respondent relies on cases decided contrary to *Fuller* to argue that Mr. Mattila's claim fails because the state is not yet seeking to collect. Brief of Respondent, p. 22. As argued in Mr. Mattila's Opening Brief, this interpretation turns *Fuller* on its head by permitting a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. This scheme impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Ordering indigent persons to pay the cost of their court-appointed attorneys without assessing whether they are able to do so unconstitutionally chills the right to counsel. *Fuller*, 417 U.S. at 53. Nonetheless, the state claims that this issue does not raise manifest error affecting a constitutional right. Brief of Respondent, pp. 23-25. But the U.S. Supreme Court has recognized that ordering an accused person to repay the cost of a public defender implicates the Sixth Amendment right to counsel. *Fuller*, 417 U.S. 40. The error in this case is manifest because the court did not conduct any inquiry into whether Mr. Mattila had the ability to pay and actually found him indigent at the end of the proceeding. An objection below would not have enhanced the record any further.

The state quotes at length from cases noting the undesirability of retrials based on errors not objected to below. Brief of Respondent, p. 24. But Mr. Mattila does not ask for a retrial based on the court's violation of his right to counsel. Rather, he simply asks this court to vacate the order that he pay attorney's fees that he cannot afford. If, as anticipated by *Fuller*, the court later finds that he has the present or future ability to pay those costs, it could order him to pay them at that time.

The court violated Mr. Mattila right to counsel by ordering him to pay the cost of his court-appointed attorney without conducting inquiry into his present or future ability to pay. RP 726-39; *Fuller*, 417 U.S. at 53. The order requiring Mr. Mattila to pay $1,500 in attorney fees must be vacated. *Id.*

CONCLUSION

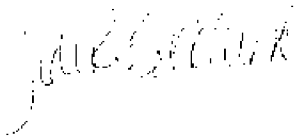
Mr. Mattila's attorney provided ineffective assistance of counsel by failing to move for suppression of the statements and evidence obtained pursuant to Mr. Mattila's unlawful arrest. The prosecutor committed prejudicial misconduct by encouraging the jury to convict Mr. Mattila based on passion and prejudice, "facts" not in evidence, and Mr. Mattila's allegedly bad character rather than the evidence in the case. The state concedes that there was insufficient evidence to convict Mr. Mattila of

unlawful possession of a firearm. Mr. Mattila's convictions must be reversed.

In the alternative, the court ordered Mr. Mattila to pay $1,500 in attorney's fees in violation of his Sixth Amendment right to counsel. The order for Mr. Mattila to pay the cost of his court-appointed attorney must be vacated.

Respectfully submitted on March 12, 2014,

BACKLUND AND MISTRY



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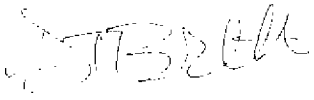

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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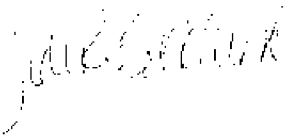
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 12, 2014.



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